

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 26, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1962-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES L. ALLEN,

Defendant-Appellant.

APPEAL from an order of the circuit court for Dane County:
MICHAEL B. TORPHY, JR., Judge. *Affirmed.*

Before Dykman, P.J., Paul C. Gartzke and Robert D. Sundby,
Reserve Judges.

PER CURIAM. James Allen appeals from an order denying his motion for sentence modification. The issue is whether the trial court properly determined that Allen failed to present a new factor that would have justified resentencing. We conclude that the grounds for Allen's motion did not constitute a new factor, and therefore affirm.

In 1986, sentence was withheld and Allen received probation on a conviction for first-degree sexual assault of a child. In 1992, Allen commenced serving the term of probation after his release from prison on other charges. In 1993, his probation was revoked for multiple violations of his conditions of probation, including contact with his grandchildren. In 1994, the court imposed a prison sentence of eight years. Allen never sought review of the probation revocation decision. At the sentencing hearing he admitted violating his terms of probation.

This appeal concerns Allen's subsequent motion for sentence modification. In that motion, for the first time, Allen contended that the probation condition prohibiting contact with his grandchildren was unlawful because it was imposed by the Department of Corrections and conflicted with the court ordered terms of probation. The court denied relief, holding that Allen's contention did not constitute a new factor and that the motion was not a timely or appropriate way to attack the revocation proceeding.

The trial court properly determined that Allen's challenge to his probation conditions did not constitute a new factor. A new factor consists of facts highly relevant to the sentence but unknown to the judge at the time of the sentencing because they were not then in existence or unknowingly overlooked by the parties. *State v. Harris*, 174 Wis.2d 367, 379, 497 N.W.2d 742, 747 (Ct. App. 1993). At the time of sentencing, the trial court knew what the conditions of probation were and knew that Allen had violated them, including the fact that he had contacted his grandchildren. The court also knew that Allen admitted violating the conditions of probation. His subsequent argument that probation was unlawfully revoked is not a new factor. It is an untimely attempt to collaterally attack the revocation.

Additionally, the fact that Allen lived for a time with his daughter and grandchildren was not highly relevant to Allen's sentence. The court sentenced him based on his underlying offense, his record of other crimes, and a number of other, far more serious, probation violations.

By the Court. – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.